NO. 87-1417

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

KLEIN INDEPENDENT SCHOOL DISTRICT and REBECCA HOLT,

Petitioners,

v.

JIM MATTOX, ATTORNEY GENERAL for the STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS FOR REVIEW

1. Whether an individual who attends a postsecondary educational institutional which is subject to the terms of the Family Educational Rights And Privacy Act of 1974, 20 U.S.C. §1232g ("FERPA") is considered to be a "student" within the meaning of the statute after she completes her studies and accepts employment as a teacher in a public school system.

2. If the individual is considered to be a "student", whether she may enforce the statutory prohibition on disclosure of her educational records without her consent through an action brought under 42 U.S.C. §1983.

PARTIES

All parties to the proceeding are identified in the caption of the case.

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IN THE SUPREME COURT OF THE UNITED STATES

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KLEIN INDEPENDENT SCHOOL DISTRICT and REBECCA HOLT,

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v.

JIM MATTOX, ATTORNEY GENERAL FOR THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Klein Independent School District and Rebecca Holt, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on October 22, 1987, with rehearing denied on November 18, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 830 F.2d 576, and is reprinted in the appendix hereto, p. 1a, *infra*.

The memorandum order of the United States District Court for the Western District of Texas (Nowlin, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 10a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983 and 28 U.S.C. §§1331 and 2201, Petitioners brought this suit in the Western District of Texas. On November 21, 1986, the district court granted Respondent's Motion for Summary Judgment as to all of Petitioners' causes of action.

The United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment on October 22, 1987. Petitioners made a timely motion for rehearing, which was denied on November 18, 1987.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C.§1254 (1).

STATUTES

This case is based on the following statutes, the full texts of which are set forth in the appendix hereto, p. 14a, *infra*.

A. Federal Statutes

1. 20 U.S.C. §1232g(a)(4)
2. 20 U.S.C. §1232g(a)(6)
3. 20 U.S.C. §1232g(b)
4. 20 U.S.C. §1232g(d)
5. 42 U.S.C. §1983

B. State Statutes

1. TEX. REV. CIV. STAT. ANN. art. 6252-17a, §1
2. TEX. REV. CIV. STAT. ANN. art. 6252-17a, §3(a)(2)

STATEMENT OF THE CASE

Petitioner Klein Independent School District ("District") is a political subdivision of the State of Texas and Petitioner Rebecca J. Holt is employed by the District as a teacher. She is duly certified as a teacher by the Texas Education Agency, pursuant to the laws and regulations of the State of Texas. Respondent Jim Mattox is the duly elected Attorney General of the State of Texas.

In 1986, Petitioners commenced the present action pursuant to 28 U.S.C. §§1331 & 2201, FERPA, 42 U.S.C. §1983, the United States Constitution, art. 6, §2 ("supremacy clause"), and Tex. Rev. Civ. Stat. Ann., art. 6252-17a (hereafter referred to as "Open Records Act"),[1] seeking declaratory and injunctive relief. Petitioners alleged that Respondent, in his official capacity as the Attorney General for the State of Texas, has issued an opinion which, if followed, would cause Petitioner Klein Independent School District to act in violation of Petitioner Holt's rights the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232g (hereafter referred to as "FERPA"), by releasing her college transcript to a member of the general public without her consent. If the District disregards the opinion, it would be subject to criminal penalties under the Open Records Act. Petitioners sought a judicial declaration that, under the supremacy clause, the FERPA rights asserted were supreme to and thus invalidated the conflicting construction of the Open Records Act. Petitioners further requested injunctive relief ordering withdrawal of Respondent's opinion requiring a denial of the federal rights asserted.

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[1]Petitioners also asserted that Petitioner Holt had a First Amendment privacy right in her college transcript. This assertion was rejected by both lower courts and is not raised in this petition.

This case arises from two requests under the Open Records Act received in October and November, 1985 by Dr. Donald Collins, Superintendent of Schools for Petitioner Klein Independent School District, for copies of the "personnel file and other related public records" regarding Petitioner Holt. Dr. Collins then requested, as permitted by the Open Records Act, an opinion from Respondent Mattox concerning whether the Open Records Act required disclosure of her college transcript kept in the personnel file. Dr. Collins believed that FERPA protects transcripts from disclosure by the college or redisclosure by a holder of that record without her consent.

On July 9, 1986, Dr. Collins received a letter from John Bible, Assistant Attorney General, stating that Petitioner Holt's college transcript must be released pursuant to the Open Records Act, and that such disclosure was not prohibited by FERPA. Upon receipt of Bible's letter, Petitioners commenced this action in order to protect Petitioner Holt's federal rights, and also to extricate Petitioner Klein Independent School District from the apparently conflicting demands of state law requiring and federal law apparently prohibiting the disclosure of Petitioner Holt's transcript. Respondent filed a Motion for Summary Judgment which was granted on November 21, 1986. The district court held that Petitioners could not assert a private cause of action under FERPA and that Petitioner Holt had no privacy interest in her college transcript.

Petitioners filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit, seeking review of all aspects of the district court's judgment. The relevant issue presented to the Fifth Circuit for its consideration was the following:

> 1. Whether [Petitioners] are entitled to maintain this action pursuant to the Family Educational Rights & Privacy Act of 1974, 20

U.S.C. §1232g, either as a private cause of action pursuant to the statute, or as an action pursuant to 42 U.S.C. §1983.

On October 22, 1987, the Fifth Circuit affirmed the district court's decision. Petitioners filed a timely Motion for Rehearing, which was denied on November 18, 1987.

Petitioners seek review of only those portions of the Fifth Circuit's decision construing FERFA. Specifically, Petitioners seek review of the Fifth Circuit's holding that Petitioner Holt is not a "student" under the definition of the term in FERPA, and its corollary holding that 42 U.S.C. §1983 is not available to Petitioners since Petitioner Holt "does not fall within the class for whose benefit FERPA was created . . . ." 830 F.2d at 580.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit has held that an individual is not considered to be a "student" when a third party seeks to obtain her college transcript from her employer rather than the educational institution which made the transcript. Because the individual is not a "student" in this situation, her transcript is not protected from random disclosure by her employer and she may not maintain an action under 42 U.S.C. §1983 to enforce the statutory prohibition of involuntary disclosure of the transcript. The questions raised by this holding concern not only issues of nationwide significance regarding the efficacy of the statute, but also the issue whether the Fifth Circuit, when interpreting the statute, was free to disregard clear congressional intent and well-settled rules of statutory construction in order to allow a state statute to override important federal statutory rights. The decision departs so far from basic principles of

statutory interpretation as to reach a result which frustrates the statutory scheme.

The Fifth Circuit's decision, in effect, means that an individual has no right to decide to whom and under what circumstances her educational records will be published if she has allowed them to be disclosed to her employer. This result is in direct conflict with the statutory provision which prevents one who has received the records with the student's consent from disseminating those records to third parties without her further consent. 20 U.S.C. §1232(b)(4)(B). Thus a significant question is raised -- whether an individual's status as a "student" entitled to FERPA protections is to be determined by reference to the source from which the records are sought or by reference to the nature of the documents at issue. The choice made by the appellate court between these alternatives permits circumvention of the statutory privacy right whenever an individual consents to disclosure of her college transcript to sources outside of the college.

This Court has not yet addressed the question whether FERPA prohibits nonconsensual disclosure of educational records to a third party by a holder of those records other than the educational institution which made those records. Congress enacted FERPA "as a response to a growing nationwide concern that no provision existed to protect school records from unauthorized use[,]" *Smith v. Duquesne University*, 612 F.Supp. 72, 80 (W.D. Pa. 1985), and took steps to ensure the privacy of information regarding students. SEN. REP. NO. 1026, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4093, 4251 ("in approving this provision concerning the privacy of information about students, the conferees are very concerned to assure that requests for information . . . do not invade the privacy of students . . . ."). These protections are, by their very nature, of the highest importance in our democratic order. As this Court has

stated, "[t]he sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well-known to be an appropriate subject of judicial notice." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979).[2] FERPA vindicates that sensitivity by creating a basic right to control the disclosure of one's educational records. Congress did not provide an implied waiver of this basic right. Query, then, whether an individual's consent to a single disclosure of her records to one source should deprive her of this fundamental right forever thereafter.

The impact of the issue is substantial. It is not the rights of a single individual which are at issue, but rather the rights of public employee in the State of Texas who has attended an educational institution and who has consented to disclosure of her educational records to a third party.[3] The effect of the Fifth Circuit's decision, if it is allowed to stand, is to deprive each and every one of these individuals of their federal right to the privacy of their educational records, notwithstanding the stated congressional purpose to protect them from unauthorized, unwarranted, or malicious publication and scrutiny of these highly personal documents. The potential abuses under the Fifth Circuit's rule are limited only by the bounds of human ingenuity. The magnitude of the problems thus created, both in terms of the number of persons who will be affected and the many ways in which their rights will be trammeled, warrants

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[2]In a footnote, the Court also acknowledged that FERPA "explicitly recogniz[es], in the context of education, the interest of an individual in maintaining the confidentiality of test scores." *Detroit Edison*, 440 U.S. at 318-19 n. 16. The decision now at issue appears to be in direct conflict with this recognition.

[3]The rights of public employees in other states are also in jeopardy to the extent that the laws of those states are similar to the Open Records Act.

an exercise of this Court's jurisdiction to review the decision.

The Fifth Circuit's decision is the result of a complete departure from basic well-established principles of statutory construction which requires this Court's review. The lower court's approach to the construction of the term "student" begs the question whether, in relationship to her transcript, rather than her employer, Petitioner Holt is entitled to FERPA's protections. In deciding the question by reference to her employer, rather than the nature of the document sought, the opinion, contrary to precedent, renders the statute both ineffective and inefficient. *United States v. Powers*, 307 U.S. 214, 217-18 (1939). The Fifth Circuit ignored its obligation, as articulated by this Court, to interpret the statute in a manner which effectuates, rather than frustrates the basic purpose of the legislative draftsman. *Shapiro v. United States*, 335 U.S. 1, 31 (1948). While a court's duty, in construing a statute, is to save rather than destroy the right granted by the statute, *United States v. Menasche*, 348 U.S. 528, 538 (1955), the Fifth Circuit's interpretation of the term "student" is not faithful to this obligation. Indeed, although the Fifth Circuit itself has noted that the office of a judge is always to construe a statute so as to suppress the mischief addressed therein and to suppress subtle inventions and evasions for continuance of the mischief, *United States v. Second National Bank of North Miami*, 502 F.2d 535 (5th Cir. 1974), *cert. denied* 421 U.S. 912 (1975), the result reached by the Fifth Circuit seems to conflict with this rule. The Fifth Circuit has gone so far astray from these basic principles as to warrant, and perhaps even require, this Court to review the decision and lead the lower court back to the mainstream of statutory interpretation.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted. If the Petitioners are

correct in urging that an individual is considered to be a "student" as that term is defined in FERPA after she completes her studies and accepts employment as a teacher in a public school system and that she may enforce her statutory right through an action brought under 42 U.S.C. §1983, the matter should be remanded to the district court for disposition on the merits of Petitioner's federal statutory and constitutional claims.

Respectfully submitted,

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APPENDIX

KLEIN INDEPENDENT SCHOOL DISTRICT, Rebecca J. Holt, Plaintiffs-Appellants,

v.

JIM MATTOX, in his official capacity as Attorney General for the State of Texas, Defendant-Appellee.

No. 87-1017

Appeal from the United States District Court for the Western District of Texas.

Before RUBIN, GARZA and JOLLY, Circuit Judges.

GARZA, Circuit Judge:

This action arises from a request by a third party to review the personnel file of a public schoolteacher. The school district sought an opinion from the Attorney General for the State of Texas as to whether its employee's college transcript was public information, and thus subject to disclosure under the Texas Open Records Act. The Attorney General's Office responded that the schoolteacher's college transcript must be released pursuant to the statute.

The teacher and school district filed this action for a declaratory judgment, stating that disclosure of the transcript would violate the teacher's privacy rights on the basis of the Family Educational Rights and Privacy Act of 1974 and the First Amendment to the United States Constitution. They further requested injunctive relief ordering withdrawal of the opinion. The defendant filed a motion for summary judgment which was granted by the district court. The court dismissed the case on the basis that the teacher was not within the class of persons intended to be protected by the Family Educational Rights and Privacy Act. The court also ruled that the

statute did not create a private cause of action. Additionally, it held that the public's interest in disclosure of the transcript outweighed the teacher's limited right to disclosural privacy. We agree with the district court, and therefore affirm.

I. Facts and Proceedings

During the months of October and November of 1985, Dr. Donald Collins, the Superintendent of the Klein Independent School District, received two letters requesting copies of the "personnel file and other related public records" of Rebecca J. Holt. Ms. Holt is a public schoolteacher employed by the school district. The requests were made pursuant to the Texas Open Records Act. Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon Supp. 1986). Dr. Collins asked the Attorney General's Office for the State of Texas whether the contents of Ms. Holt's personnel file, particularly her college transcript, were public records subject to disclosure under state law. An Assistant Attorney General sent an opinion to Dr. Collins informing him that, in addition to the other documents, Ms. Holt's college transcript must be released according to the Texas Open Records Act. Moreover, such disclosure was not proscribed by the Family Educational Rights and Privacy Act of 1974 (FERPA). 20 U.S.C. §1232g (1974). Part of the support for this opinion came in response to the attorney's question to the Director of the FERPA Office. The Director stated that FERPA was inapposite in this regard because it pertained solely to education records of students. Excluded from FERPA are records relating to an individual who is employed by an agency or institution.

On July 14, 1986, Ms. Holt and the school district brought suit against Jim Mattox, the Attorney General for the State of Texas, alleging that he issued an opinion which, if followed, would cause the school district to act in violation of Ms. Holt's rights secured under FERPA

and the First Amendment to the United States Constitution. Suit was brought pursuant to FERPA, the first amendment, 42 U.S.C. §1983, Article VI of the United States Constitution, and the Texas Open Records Act. The plaintiffs sought declaratory relief stating that, by virtue of the supremacy clause, Ms. Holt's FERPA and first amendment privacy rights were supreme to the requirement of disclosure under the Open Records Act. They also requested injunctive relief ordering withdrawal of the Attorney General's opinion.

On September 16, 1986, the defendant filed a motion for summary judgment on the basis that, inter alia, no clause of action under FERPA was stated. The defendant urged that FERPA does not provide for a private cause of action. Moreover, Ms. Holt did not fit within FERPA's definition of "student" and her transcript did not fall within the statute's definition of "education records." The defendant also claimed that Ms. Holt's interest in the confidentiality of her college transcript did not rise to the level of a constitutionally protected right to privacy. On the other hand, the plaintiffs insisted that if the school district refused to disclose the transcript because of FERPA or the first amendment, it would be subject to criminal prosecution under the Open Records Act. However, if it acted in accordance with the defendant's opinion, it would expose itself to liability for violating Ms. Holt's privacy protections.

On November 21, 1986, the district court granted the defendant's motion for summary judgment, and entered a final order dismissing the case. The court found that Ms. Holt was not in the class of persons protected by FERPA, and that FERPA did not create a private cause of action. Considering her first amendment claim, the court recognized that the public has a compelling interest and concern in the education of its young citizens. That interest encompassed the right of the public to know that schoolteachers are qualified to

teach. The court concluded that the public's interest in disclosure of her transcript outweighed Ms. Holt's limited right to disclosural privacy.

II. Discussion

The district court granted the defendant's summary judgment motion. Summary judgment is appropriate only if the record reveals no genuine issue as to any material fact, and that the defendant is entitled to judgment as a matter of law. *Pharo v. Smith*, 621 F.2d 656, 664 (5th Cir. 1980). The appellants present two issues to this Court. The first issue is whether the lower court erred in ruling that they are not entitled to maintain this action pursuant to FERPA, either as a private cause of action or as an action under 42 U.S.C. §1983. The second issue is whether the court erred in finding that Ms. Holt's interest in maintaining the confidentiality of her academic record did not outweigh the public's interest in learning whether she is qualified to teach.

A. FERPA

The appellants essentially make two challenges to the district court's FERPA ruling. They contend that *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), provides the rationale for the proposition that a private cause of action exists under FERPA. Alternatively, they argue that even if a private right of action cannot be inferred from FERPA, 42 U.S.C. §1983 is available for vindication of the potential violation of Ms. Holt's protections. To better understand the appellants' argument, a review of FERPA is necessitated.

FERPA was designed to regulate the release of student records. A student's or parent's consent is required where personally identifiable information from the education records of a student is to be disclosed. The

Secretary of Education is empowered to enforce the various provisions of FERPA. 20 U.S.C. §1232g(f). An educational agency or institution that unlawfully releases a student's record may lose federal funding. 20 U.S.C. §1232g(b)(1). This is the only express remedy provided in the statute. FERPA neither explicitly provides for a private cause of action, nor does its legislative history indicate that its drafters intended one.

[1] Naturally, we are alerted to the problem that Ms. Holt is employed by the school district, and is not a student and never has been a student of the subject school district. It is fundamental from a reading of FERPA that a "student" is a "person" with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution." 20 U.S.C. §1232g(a)(6); *see* 34 C.F.R. §99.3. Further, FERPA's definition of an "education record" does not include those "persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose[.]" 20 U.S.C. §1232g(a)(4)(B); *see* 34 C.F.R. §99.3. It is evident that "education records" refer only to those documents which "are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. §1232g(a)(4)(A); *see* 34 C.F.R. §99.3.

It cannot be disputed that the statute was enacted to prevent an educational agency or institution from releasing the record of one of its own students. Excluding from FERPA's protections are records relating to an individual who is employed by an educational agency or institution. Because Ms. Holt has

not attended any school within the Klein Independent School District, the agency which has been directed to release her transcript, she cannot be considered a "student" under the FERPA definition. Rather, Ms. Holt's capacity with the school district is that of an employee. Because she is an employee and not a student of the institution requested to disclose her transcript, she does not fall within that class of people for whose benefit FERPA was created. Ms. Holt is not a "student" and her college transcript is not an "education record" protected from disclosure pursuant to FERPA's provisions.

This determination eliminates the appellants' instruction to apply *Cort v. Ash* to determine whether a private cause of action exists under FERPA. For that matter, it is plain that the appellants could not pass the threshold requirement of *Cort v. Ash* that the party be a member of the class for whose especial benefit FERPA was created. 422 U.S. at 78, 95 S.Ct. at 2088. We do note, however, that courts which have considered the question have determined that no private cause of action, either explicitly or implicitly, was created or intended. *Fay v. South Colonie Cent. School Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); *Girardier v. Webster College*, 563 F.2d 1267, 1277 (8th Cir. 1977); *Smith v. Duquesne Univ.*, 612 F.Supp. 72, 79-80 (W.D. Pa. 1985) (applying *Cort v. Ash*), aff'd, 787 F.2d 583 (3d Cir. 1986); *Price v. Young*, 580 F. Supp. 1, 2 (E.D. Ark. 1983).

The appellants' alternative contention is that 42 U.S.C. §1983 is available under these circumstances to prevent an injury to her federal statutory rights by the State of Texas. The appellants cite to *Fay v. South Colonie*, where the Second Circuit considered a §1983 action which sought relief for a violation of the right of access granted by FERPA. 802 F.2d at 33. The court determined that FERPA creates an interest that may be vindicated in a §1983 action because Congress did not create so comprehensive a system of enforcing the statute as to demonstrate an intent to preclude a remedy

under §1983. *Id. Fay* is clearly distinguishable from the present appeal, however, because the action was brought by a father against the school district for denying him access to his children's records, and the school district conceded that it denied him access to those records. *Id.* Therefore, we need not rule whether FERPA, its legislative history or its regulations demonstrate a congressional intent to permit suits under §1983 to remedy violations of FERPA. Additionally, because of our finding that Ms. Holt does not fall within the class for whose benefit FERPA was created, the statute does not bestow on her enforceable rights, privileges or immunities which can be enforced by 42 U.S.C. §1983.

B. Balancing the Interests

The district court found that Ms. Holt had a privacy interest in her college transcript. The Supreme Court has written that there are two different kinds of privacy interests. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 598, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977); *see generally, Seng, The Constitution and Informational Privacy, or How So-Called Conservatives Countenance Governmental Intrusion into a Person's Private Affairs*, 18 J. Marshall L.Rev. 871 (1985).

[2,3] Under the autonomy branch of privacy, constitutional protection has been limited to intimate personal relationships or activities, and freedoms to make fundamental choices involving oneself, one's family, and one's relationships with others. *See Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976). The appellants seek constitutional protection from an action quite dissimilar from that which has been held to be protected. Their claim is based not upon a challenge to the state's ability to restrict her freedom of action in a private matter, but rather on a

claim that the state directed a college record to be released. Obviously, this is not a question concerning the autonomy branch of the right to privacy.

[4] Regarding the interest in confidentiality, the Supreme Court has defined this branch as "the individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. at 599, 97 S.Ct. at 876. There is some debate whether a student maintains a privacy interest in his educational records. In *Smith v. Duquesne Univ.*, the district court wrote: "FERPA's legislative history indicates that it is principally a right to privacy of educational records act. *See* 120 Cong. Rec. S39858 (daily ed. Dec. 13, 1974) (joint remarks of Sen. Buckley and Sen. Pell)." 612 F.Supp. at 80. The court concluded that a student has a privacy interest in his academic records. Without engaging in an inquiry into whether Ms. Holt has a recognizable privacy interest in her college transcript, we believe that, under the balancing test, even if she did have an interest it is significantly outweighed by the public's interest in evaluating the competence of its schoolteachers.

The district court relied on *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1047-48, 59 L.Ed.2d 90 (1979), in stating that Ms. Holt has a constitutional right to avoid disclosure of personal matters. The court then balanced Ms. Holt's privacy interest against the public's interest in knowing about her educational background. Although her file may contain "embarrassing or confidential information," the court noted, the public interest in learning whether those who teach young children are qualified clearly outweighs her limited right to disclosural privacy.

The appellants contend that the public's interest can be vindicated through less intrusive means than presented in this case. The appellants propose that since her teaching certificate represents the informed judgment of the Texas Board of Education that she is

qualified to teach, disclosure of the certificate itself fully serves the public's interest in being assured that those who teach are qualified. Therefore, the certificate and not a college transcript suffices, and to require disclosure of the transcript operates to invade Ms. Holt's interest in maintaining the confidentiality of her academic career.

The public's interest in disclosure of a schoolteacher's transcript is set forth in section 1 of the Texas Open Records Act.

> Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. To that end, the provisions of this Act shall be liberally construed with the view of carrying out the above declaration of public policy.

Tex. Rev. Civ. Stat. Ann. art. 6252-17a, §1. The Open Records Act, however, does make provision for safeguarding the personal privacy of the individual. Section 3(a)(2) of the statute exempts from public disclosure "information in personnel files, the disclosure of which would constitute a clearly unwarranted

invasion of personal privacy[.]" Tex. Rev. Civ. Stat. Ann. art. 6252-17a, §3(a)(2). We do not find that the disclosure of a schoolteacher's college transcript rises to the level of that information which constitutes an unwarranted invasion of personal privacy, as provided in section 3(a)(2). Further, at oral argument the appellants acknowledged that disclosure of Ms. Holt's transcript is not exempted under this section. *See Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 551 (Tex. App. 3d Dist. 1983).

We agree with the district court in tipping the balance in favor of the right of the public to know the academic records of the schoolteachers of their children. The appellants' reasoning concerning the regulations imposed by the Texas Legislature and the screening procedures of the Texas Board of Education is unavailing. Recently, there has been grave concern in Texas about the quality of public education, notwithstanding the state's regulations. Many teachers who had been certified and were teaching in Texas classrooms could not pass a basic test of minimal competency. In light of this apparent lack of competency prevalent in the state, the public must have full and complete information concerning the teachers who serve the public in educating their children.

III. Conclusion

Finding no merit in the appellants' claims and agreeing with the district court that the defendant was entitled to judgment as a matter of law, we AFFIRM the court's decision to grant summary judgment in this case.

No. 87-1017

D.C. Docket No. A-86-CA-396

KLEIN INDEPENDENT SCHOOL DISTRICT, REBECCA J. HOLT,

Plaintiffs-Appellants,

versus

JIM MATTOX, In his official capacity as State Attorney General,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

Before RUBIN, GARZA, and JOLLY, Circuit-Judges/

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

October 22, 1987

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1017

KLEIN INDEPENDENT SCHOOL DISTRICT, REBECCA J. HOLT,

Plaintiffs-Appellants,

versus

JIM MATTOX, In his official capacity as State Attorney General,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(November 18, 1987)

Before RUBIN, GARZA and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

ENTERED FOR THE COURT:

United States Circuit Judge

/s/ R. B. Rubin

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

KLEIN INDEPENDENT SCHOOL DISTRICT and REBECCA J. HOLT	§	
VS.	§	CIVIL NO. A-86-CA-396
JIM MATTOX, in his Official Capacity as Attorney General for the State of Texas	§	

ORDER

Before the Court is the Defendant's Motion for Summary Judgment. The Court has considered the Motion and the Plaintiff's response in light of the applicable case law, and is of the opinion that the motion is meritorious and should be GRANTED.

In considering a motion for summary judgment, the Court must construe all facts and inferences in the light most favorable to the party resisting the motion. Summary judgment must be granted if the record reveals no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Pharo v. Smith*, 621 F.2d 656, 664 (5th Cir. 1980).

The Defendant alleges that summary judgment is appropriate because Plaintiffs cannot assert a private cause of action under the Family Educational and Privacy Rights Act, 20 U.S.C. §1232g (1978) (the Buckley/Pell Amendment) and because Plaintiff Holt has no privacy interest in her college transcripts.

The Buckley/Pell Amendment is designed to regulate the release of student records. 20 U.S.C. §1232g(a)(1)(A); *see Girardier v. Webster College*, 563 F.2d 1267, 1276 (8th Cir. 1977). An educational agency or institution that violates any provision of the amendment will lose federal funding. 20 U.S.C. §1232g(a)(1)(A). This is the only remedy provided in the amendment. Enforcement is left solely to the Secretary of Health, Education and Welfare. *Id.* §1232g(f). The amendment does not provide for a private cause of action. Further, the courts which have addressed the issue determined that no private cause of action arises by inference. *Girardier*, 563 F.2d at 1277; *Smith v. Duquesne University*, 612 F.Supp. 72, 79-80 (D.C. Pa. 1985) (*applying Cort v. Ash*, 422 U.S. 66, 78 (1975); *Price v. Young*, 580 F.Supp. 1-2 (D.C. Ark. 1983). This Court

finds that a private cause of action does not exist under the Buckley/Pell Amendment.

Defendant also argues that Plaintiff Holt has no constitutionally protected privacy interest in her college transcripts and therefore cannot maintain a section 1983 suit. This Circuit recognizes two interrelated strands of an individual's constitutional right to privacy: "'One is the individual's interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.' *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)." *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981); *Plante v. Gonzalez*, 575 F.2d 1119, 1133 (5th Cir. 1978); *contra J. P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981). The disclosural privacy right is afforded less protection than the decision-making strand. *Plante*, 575 F.2d at 1132-33. To determine whether an individual's privacy interest has been violated the Court must "balance the interest" and determine whether the government's interest in disclosure outweighs the Plaintiff's interest in the confidentiality of her transcripts. *Id.* at 1133-34.

Pursuant to the Texas Open Records Act, TEX. REV. CIV. STAT. ANN. art. 6252-17a, §7 (Vernon Supp. 1986), the Defendant opined that the Plaintiff school district must releast Plaintiff Holt's transcripts pursuant to certain provisions of that Act. Plaintiff alleges that this disclosure infringes upon her limited right to disclosural privacy. Her interest in keeping academic records confidential is apparent. The information contained therein is not published to the general community and may contain embarrassing or confidential information. This interest must be weighed against the governmental interest in disclosure.

The Defendant rendered his opinion under the Texas Open Records Act. The government's, and necessarily the public's, interest in disclosure of information such as that in issue is aptly set forth in section 1 of the Act:

> Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of

> government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. To that end, the provisions of this Act shall be liberally construed with the view of carrying out the above declaration of public policy.

TEX. REV. CIV. STAT. ANN. art. 6252-17a, §1 (Vernon 1986). Plaintiff Holt is a teacher employed by the Plaintiff school district. This Court is of the opinion that the public has a compelling interest and concern in the education of its young citizens. This interest encompasses the public right to be assured that those who teach our young citizens are qualified. The Court is of the opinion that the governmental interest in disclosure of Plaintiff Holt's transcript, expressed in the Texas Open Records Act, clearly outweighs her limited right to disclosural privacy.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Defendant's Motion for Summary Judgment is hereby, in all respects, GRANTED.

SIGNED and ENTERED THIS 21st day of November, 1986.

/s/JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

A. Federal Statutes

1. 20 U.S.C. §1232g(a)(4)

For the purposes of this section, the term "education records" means, except as maybe provided otherwise in subparagraph (b), those records, files, documents, and other materials which –

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(b) the term "education records" does not include –

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of maker thereof and which are not accessible or revealed to any person except to substitute;

(ii) if the personnel of a law enforcement unit do not have access to education records under subsection (b)(1) of this section, the records and documents of such law enforcement unit which (I) are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;

(iii) in the case of persons who are employed by an educational agency or institution, but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's

capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

2. 20 U.S.C. §1232g(a)(6)

For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

3. 20 U.S.C. §1232g(b)

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following -

(A) other school officials, including teachers within the educational institution or local educational

agency, who have been determined by such agency or institution to have legitimate educational interests;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an education agency (as defined in section 1221e3(c) of this title), or (iv) State educational authorities, under the conditions set forth in paragraph (3) of this subsection;

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of Title 26; and

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless -

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, (C) an administrative head of an education agency or (D) State educational authorities from having access to students or other records which may be necessary in connection with the audit and evaluation of Federally-supported education program, or in connection with the enforcement of the Federal legal requirements which relate to such programs: Provided, that except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A)Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other

party to have access to such information without the written consent of the parents of the student.

4. 20 U.S.C. §1232g(d)

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

5. 42 U.S.C. §1983

Every person who, under collar of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunity secured by the Constitution and Laws, shall be liable to the party injured in an action outlaw, suit in equity, or other proper proceeding for redress.

B. State Statutes

1. Tex. Rev. Civ. Stat. Ann. art. 6252-17a, §1

Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants

the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. To that end, the provisions of this Act shall be liberally construed with the view of carrying out the above declaration of public policy.

2. Tex. Rev. Civ. Stat. Ann. art. 6252-17a, §3(a)

(a) All information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body, with the following exceptions only:

(1) Information deemed confidential by law, either Constitutional, Statutory, or by Judicial decision;

(2) Information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; provided, however, that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as his public information under this Act[.]

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